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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 86

COLORADO INTERSTATE NATURAL GAS CO., PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 593-610) is reported at 209 F. 2d 717; its opinion on rehearing (R. 630-633) is reported at 209 F. 2d 732. The opinion and order of the Federal Power Commission directing the rate reduction (R. 77-140) are reported at 95 PUR (NS) 97.

JURISDICTION

The original judgment of the Court of Appeals was entered on October 29, 1953 (R. 610). Colorado's timely petition for rehearing (R. 622-629) was denied on January 13, 1954 (R. 630). Pursuant to the Commission's timely petition for rehearing, however, the Court of Appeals vacated its original judgment, granted rehearing, and entered judgment on rehearing on January 25, 1954 (R.

610-621, 633). By order of Mr. Justice Clark entered March 31, 1954, Colorado's time for filing a petition for a writ of certiorari was extended to and including May 21, 1954. The petition for a writ of certiorari was filed on May 20, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)).

QUESTIONS PRESENTED

1. Whether the circumstances of this case justified the Federal Power Commission's finding, on the basis of which it omitted the intermediate decision procedure in accordance with Section 8(a) of the Administrative Procedure Act, that "upon the record * * * due and timely execution of its functions imperatively and unavoidably so requires."

2. Whether the court below properly affirmed the Commission's determination that a 5¾% rate of return on Colorado's rate base was fair, reasonable and adequate to assure confidence in the financial soundness of the utility, to maintain its credit, and to enable it to attract capital necessary for the proper discharge of its public duties.

STATUTES INVOLVED

The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 *et seq.*) and of the Natural Gas Act (52 Stat. 821, 15 U. S. C. 717 *et seq.*) are set out in the Appendix, *infra*, pp. 20-25.

STATEMENT

Petitioner seeks review of the judgment involved in *Federal Power Commission* v. *Colorado*

Interstate Gas Company, No. 45, this Term. The Statement in the Petition in No. 45 is generally applicable here, and reference thereto is respectfully made. The additional facts pertinent to the two issues raised by the instant petition may be summarized as follows:

1. *Omission of Intermediate Decision Procedure.* On its own motion, the Federal Power Commission, on September 3, 1948, instituted an investigation into Colorado's rates and charges subject to the Commission's jurisdiction. With the institution of the rate investigation, the Commission's staff undertook an engineering and inventory study of the books, records, property and operations of Colorado, as well as of Canadian River Gas Company, also named in the Commission's order. The investigation was, however, temporarily suspended during pendency before the Commission of the joint application of Colorado and Canadian River for permission to merge their properties. See Pet. in No. 45, pp. 5-6. Subsequent to the Commission's approval of the merger, the investigation was directed solely to Colorado's rates.[1] Hearings before a presiding examiner of the Commission began on October 1, 1951, and, with recesses intervening,[2] concluded on April 4, 1952 (see R. 67-68).

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[1] In authorizing the merger, the Commission noted that "the future pattern of operations" for Colorado was settled and that the "rate investigation should be brought to a speedy conclusion" (R. 562).

[2] In large measure the recesses resulted from motions filed by Colorado (R. 68; see, *e.g.*, R. 20-23, 24-30, 33-42). In connection with one of these motions, the Commission reserved decision pending the conclusion of the hearings, commenting

On April 9, 1952, Commission staff counsel moved the Commission to direct the omission of the intermediate decision, as permitted by Section 8(a) of the Administrative Procedure Act, *infra,* pp. 21-22, and by the Commission's Rules of Practice and Procedure.[3] The motion pointed out (1) that it appeared on the record that Colorado's rates had been excessive for at least more than the three years of the pendency of the rate investigation; (2) that Colorado's customers have no redress under the Natural Gas Act from such past excessive exactions; and (3) that their relief can only come when the Commission enters an order reducing rates. Accordingly, the motion concluded that "It is in the public interest to put an end to the exaction of excessive revenues by Colorado * * *" (R. 57-59). Colorado objected that the omission of the intermediate decision was not sanctioned by Section

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that "It would be in the public interest to conclude the hearing in this matter with all reasonable dispatch" (R. 31). See, also, R. 43-44, where the Commission, on appeal by staff counsel, overruled the presiding examiner's grant of Colorado's request to continue the hearings for about eight weeks.

[3] In accordance with Section 8 of the Administrative Procedure Act, the Commission's Rules of Practice and Procedure provide that the presiding examiner, upon conclusion of the hearing, shall file a recommended decision, which is subject to exception by counsel and review by the Commission in the manner and within the time there provided. See 18 C.F.R., Sections 1.30(b), 1.31. The Commission's Rules, however, go on to provide, as also sanctioned by Section 8(a) of the Administrative Procedure Act, that this intermediate decision procedure may be omitted, with or without request or motion therefor, upon a finding by the Commission that due and timely execution of its functions imperatively and unavoidably requires such omission. 18 C.F.R., Section 1.30 (c)(2).

8(a) since, according to Colorado, the issues were sharply controverted and the proceeding accusatory in nature (R. 59-64).

By order of May 23, 1952, the Commission, noting (1) that "This proceeding has been in progress for a regrettably long period of time, responsibility for which fact is not attributable to any one particular party" (R. 68) and (2) that it "has no power of reparation with respect to past rates, which may or may not prove to be excessive" (R. 68), found that "due and timely execution of its functions imperatively and unavoidably requires the Commission to omit the intermediate decision procedure in this proceeding" (R. 69). Pursuant to this order, the Commission heard oral argument on all questions raised on June 9, 1952 (R. 78). On August 8, 1952, the Commission issued its opinion and accompanying order, directing Colorado to reduce its rates for sales subject to the Commission's jurisdiction by the net amount of about $2,700,000 (R. 77-140).

The Court of Appeals affirmed the Commission's omission of the intermediate decision (R. 594-597). It held that Section 8(a) of the Administrative Procedure Act vested discretion in the Commission to omit the intermediate decision in two specified instances and that the Commission's findings fully satisfied the prescribed requirements for invoking one of these exceptions—*i. e.*, the exception for cases where "the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires" (R. 595-597).

Judge Bratton dissented on this issue (R. 609-610).

2. *Rate of Return.* One of the elements on which the Commission based its conclusion that Colorado's rates for sales subject to the Commission's jurisdiction should be reduced by a net amount of $2,700,000 was its finding, after examination of the evidence, that a 5¾% rate of return on Colorado's rate base was "fair, reasonable and adequate to assure confidence in the financial soundness of the utility; to maintain its credit and to enable it to attract capital necessary for the proper discharge of its public duties" (R. 102). The Commission found that after the payment of the actual interest cost of 3.21% on its long term indebtedness of $29,600,000,[4] and the 6% dividend on its $2,000,000 of preferred stock (which was to have been retired

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[4] Colorado's outstanding long-term indebtedness of $29,600,000 amounts to 53.9% of its total capitalization and consists of the following four issues of long-term serial notes (R. 99):

2% Notes, due $400,000 semi-annually May 1, 1952, through May 1, 1954 (excluding $800,000 of such notes due within one year and so included in current liabilities) $1,200,000

2¾% Notes, due $400,000 semi-annually November 1, 1954, through November 1, 1964 ..... $8,400,000

3⅛% Notes, due $250,000 semi-annually October 1, 1952, through April 1, 1964..... $8,000,000

3¾% Notes, due $400,000 semi-annually February 1, 1955, through August 1, 1964.. $12,000,000

The average weighted interest cost on these notes is 3.21% (R. 99).

on or before December 1, 1952), this rate of return would allow a gross return of 8.95% on the common stock equity which, after deducting ½% cost of financing, leaves a net return of 8.45% to the equity owner.[5]

In support of its conclusion that a return of 8.45% on the common stock equity would be fair and reasonable, the Commission found that a study of the investor's appraisal of the common stock of nine natural gas companies offered to the public showed that during the five years ending August, 1951, investors have been requiring an average return of 8.3% on publicly sold issues (R. 100). The Commission also found that the average earnings-price ratios of the outstanding common stock of the seven natural gas companies traded on recognized exchanges for the same five-year period was 8.2%, with the average for the last year of that period being 7.5% and decreasing to 6.4% in October, 1951. (R. 100.)

In addition, the Commission found that Colorado's own experience provided persuasive evidence as to the cost of equity capital. On April 2, 1952, two days prior to the conclusion of the hearings before the Commission, two of Colorado's principal stockholder groups offered for public sale 966,000 shares of common stock held by them

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[5] The common stock equity, which constitutes 42.5% of Colorado's capitalization, includes not only the par value of the common stock ($8,555,000) but also surplus ($14,759,000) (R. 99).

(R. 101). This was the first public offering ever made of Colorado's stock, and the amount offered represented 56% of the total common stock outstanding (R. 101). Notwithstanding the fact that the stock with a book value of $13.63 was offered at $26.75 per share (to net the selling stockholders $25.25 a share), with the result that, based on 1951 earnings of $1.88 a share, the earnings-offering price ratio was 7.03% (and the earnings-net price to the selling stockholders' ratio was 7.44%), the public offering was oversold (R. 101).[6]

The court below unanimously affirmed the 5¾% rate of return fixed by the Commission (R. 604-608). Noting that under *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 603, the return to the equity owners was required to be "commensurate with returns on investments in other enterprises having corresponding risks", the court ruled that "the history and experience of other successful companies engaged in the production, transportation and sale of gas would furnish the best guide as to what was fair and adequate" (R. 607), and held that these materials, as well as Colorado's own experience in offering its common stock, amply supported the Commission's result. The court concluded by stating that *State Corporation Commission of the State of Kansas, Northern Natural Gas Company* v. *Federal Power Commis-*

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[6] The prospectus in connection with the offering mentioned the pendency of the rate proceeding before the Commission and the possibility of a resulting substantial reduction in income available for common stock (see R. 101).

sion, 206 F. 2d 690 (C. A. 8), certiorari denied, 346 U. S. 922, rehearing denied June 7, 1954, was distinguishable (R. 608).

ARGUMENT

1. *The circumstances of this case justified the Commission's omission of the intermediate decision procedure.* (a) Section 8(a) of the Administrative Procedure Act, *infra,* pp. 21-22, which establishes the intermediate decision procedure, recognizes the undesirability of making the requirement one of universal applicability by expressly sanctioning its omission in certain situations. Of critical importance here is the exception that

> * * * in rule making or determining applications for initial licenses * * * such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.[7]

Colorado concedes that the determination of future rates, such as is here involved, constitutes rule making (Pet. 6, 12). See Section 2(c) of the Ad-

[7] Congressman Walter, one of the co-authors of the Act, stated, as one of the reasons for setting up this exception in rate-making and initial licensing cases, that "the parties will be better served if the proposed decision * * * reflects the views of the responsible officers in the agencies whether or not they have actually taken the evidence." Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 361. It is noteworthy too that this type of case is exempted from the provision of Section 5(c) of the Administrative Procedure Act, *infra,* pp. 20-21, forbidding consultation in the decisional process between the hearing officers or agency head and the staff participating in the hearing.

ministrative Procedure Act, *infra*, p. 20. In addition, the Commission expressly found, as required by Section 8(a), that "due and timely execution of its functions imperatively and unavoidably requires the Commission to omit the intermediate decision procedure in this proceeding" (*supra*, p. 5; R. 69).

In these circumstances, the issue becomes whether in the particular factual situation found by the Commission to exist here—*i. e.*, where the Commission's investigation into the reasonableness of Colorado's rates had been pending, through no fault of either party, for more than three years, and the Commission had no authority to correct inequities resulting from excessive rates charged prior to the issuance of its order finding these rates unjust [8]—it was proper to omit the intermediate decision in order to permit a more expeditious determination by the Commission as to the reasonableness of Colorado's rates.[9] Since the Natural

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[8] In a rate investigation such as is here involved, brought under Section 5 of the Natural Gas Act, *infra*, pp. 24-25, there is no provision similar to that of Section 4(e) of the Act, *infra*, pp. 22-23, which is applicable only where a natural gas company has applied for a rate increase, and which provides that after a five-month suspension, the increased rate may become operative under bond to insure repayment of the excessive revenues collected.

[9] Contrary to Colorado's implication (Pet. 15), the Commission had not prior to the issuance of its opinion and order already determined that Colorado's rates were excessive. The Commission's order directing the omission of the intermediate decision merely points to its lack of "power of reparation with respect to past rates *which may or may not prove to be excessive*" (italics supplied) (R. 68). However, in determining

Gas Act provides no relief as to past unreasonably high rates, permitting the natural gas company to collect such excessive exactions until the Commission issues an order determining them to be unlawful and to retain the proceeds from the rates charged until that time, the court below properly held that the situation in this case justified the Commission's exercise of discretion in directing the omission of the intermediate decision. Cf. *Alabama-Tennessee Natural Gas Co.* v. *Federal Power Commission,* 203 F. 2d 494, 497-498 (C. A. 3); *Kenny* v. *United States,* 103 F. Supp. 971, 978 (D. N. J.) (three-judge court).[10]

In any event, since the issue sought to be raised admittedly turns upon the adequacy of particular findings to support the Commission's conclusion

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whether the intermediate decision procedure should be omitted, the Commission was not required to ignore evidence tending to show that the rates were excessive. Indeed, its decision to omit is bound to be "upon the record." In this connection, it should also be noted that the Commission did not construe its lack of reparation authority as a grant of additional jurisdiction (see Pet. 15); rather it referred to this lack as one of the factors showing the strong need for a speedy determination of an already unduly prolonged rate investigation.

[10] Colorado seeks to distinguish the cited cases from the present one on the ground that in the *Kenny* and *Alabama-Tennessee* cases, the company had in effect waived or consented to the omission of the intermediate decision, whereas here Colorado protested the omission at every possible opportunity (Pet. 16). But in *Alabama-Tennessee*, the company objected to the omission in connection with the administrative order on which review was sought (see 203 F. 2d at 497-498). Moreover, in both cases, the company's consent was referred to as a supporting, rather than as the principal basis for decision, with the principal emphasis being that the matter was within the agency's sound discretion.

(Pet. 14-15), the question is not of sufficient general importance to warrant review by this Court.

(b) Urging that the explicit exception in Section 8(a) could not apply in this case (Pet. 16-18), Colorado invokes the following statement in the House and Senate Committee reports (Sen. Doc. 248, 79th Cong., 2d Sess., p. 210):

> However, it may be noted that even in those cases if issues of fact are sharply controverted or the case or class of cases tends to become accusatory in nature, sound practice would require the agency to adopt the intermediate recommended decision procedure.

In Colorado's view, the present proceeding was accusatory in nature and involved the credibility of witnesses; accordingly, it is argued, omission of the intermediate decision procedure was improper.

There are two ready answers to this argument: First, the sentence Colorado quotes from the committee reports, read in its context, plainly leaves to the discretion of the administrative agency the procedural judgment in issue here. Second, as the court below held (R. 596-597), the proceeding did not actually involve "sharply controverted" issues of fact and was not "accusatory in nature."

Immediately preceding the statement Colorado quotes from the Senate Report, the following appears (Sen. Doc. 248, 79th Cong., 2d Sess., p. 210):

> The alternative intermediate procedure which an agency may adopt in rule making or

> determining applications for initial licenses lies in the discretion of the agency. In order to simplify the bill, the exception which confers this discretion is broadly drawn.

On the same subject, the Report later says (*id.* at 216):

> The exemption of rule making and determining initial applications for licenses from provisions of sections 5(c), 7(c) and 8(a) may require change if, in practice, it develops that they are too broad. Earlier in this report, in commenting upon some of those provisions, the committee has expressed its reasons for the language used and has stated that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions.

Read as a whole, these statements leave no doubt that even if the present proceeding had actually been accusatory and had actually raised sharp issues of fact, the Commission could in its discretion have omitted the intermediate decision by making the finding required by Section 8(a).

The situation here, however, is that the administrative proceeding was *not* "accusatory in nature" and did *not* involve sharply contested issues of fact. "Accusatory in nature" refers to cases where "the accusatory element is strong, and individual compliance or behavior is challenged." Sen. Doc. 248, 79th Cong., 2d Sess., p. 225. In a rate investi-

gation, such as we have here, involving only the prescription of reasonable rates for the future on the basis of the facts adduced at the hearing, the accusatory and disciplinary elements are entirely lacking.

Similarly, as found by the court below, there were no sharply contested issues of fact, and credibility of witnesses was not involved. The court below did not undertake to set out in its opinion the detailed evidence so demonstrating, but it did analyze the record carefully, and on the basis of its analysis it concluded that Colorado's claim had no substance (R. 597):

> * * * The facts with respect to the financial structure of Colorado, its gross revenues, as well as its expenditures, were all taken from the company's books. With slight variation the facts as revealed by Colorado's books were taken as the basic facts considered by the Commission in reaching its conclusions. The line of cleavage came with respect to the methods to be employed in allocating revenue and expenditures between jurisdictional and non-jurisdictional operations and the proper method by which to fix depletion, as well as other relevant matters. The difference between the parties involved difference of opinion and the inferences and deductions to be drawn from established basic facts. These issues arose in specialized fields calling for the

> opinion of experts. It was not a question of the credibility of the expert witnesses but rather a question of the weight to be accorded to their opinions. The Commission was as competent to pass on these questions without the examiner's intermediate report as with it because these questions were plainly within the Commission's expert competency.

This conclusion is fully supported by the record (cf. *Gloyd* v. *Commissioner of Internal Revenue*, 63 F. 2d 649, 650-651 (C.A. 8); Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 271; "*A Manual on Trial Technique in Administrative Proceedings*" (1950) by Judge Prettyman, at pp. 23-24 [11]) and presents no occasion for intervention by this Court. Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[12]

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[11] "It is extremely rare that expert testimony in these [administrative] proceedings is actually false. Conscious falsity is an unusual occurrence, but experts are fallible. Often expert testimony is erroneous, because it is inaccurate or the underlying material is incomplete or because the basic reasoning employed is fallacious.

"Erroneous expert testimony can best be exposed and destroyed by means of the testimony of other experts and by the lawyer's own argument addressed to the expert knowledge of the tribunal itself."

[12] Contrary to Colorado's implication (Pet. 12, 18), the *Universal Camera* case does not support its position. Apart from the fact already pointed out that the instant case, unlike *Universal Camera*, raises no issue of credibility of witnesses, *Universal Camera*, as noted by the court below, held only "that the trial examiner's report constituted evidence which should be considered along with all other facts and circumstances by the board in reaching its conclusion whether there was substantial

2. *The court below properly upheld the 5¾% rate of return fixed by the Commission.* (a) Contrary to petitioner's claim (Pet. 19-20), the affirmance of the 5¾% rate of return fully accords with the standards set out in this Court's prior decisions. "The question for the courts when a rate order is challenged is whether the order viewed in its entirety and measured by its end results meets the requirements of the Act." *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 324 U.S. 581, 605; *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591, 602; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 324 U.S. 635, 649; *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 343 U.S. 414, 424. In determining a fair and reasonable rate of return, the Commission is required to allow a return sufficient to maintain the financial integrity of the company. It must allow for service on the long-term indebtedness, reasonable dividends on the stock, and a sufficient margin of earnings for transfer to surplus. Cf. *United Railways* v. *West,* 280 U.S. 234, 251-252. The return to the stockholder "should be commensurate with returns on investments in other enterprises having corresponding risks", so as to maintain the company's "credit and to attract capital". *Federal Power Commission* v. *Hope Natural Gas Co., supra* at 603; *Colorado Interstate Gas Co.* v. *Fed-*

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evidence showing a violation. There was not involved the question under what conditions, if any, the examiner's report might be dispensed with" (R. 596-597).

eral Power Commission, supra; Panhandle Eastern Pipe Line Co. v. *Federal Power Commission, supra,* at 650.

The 5¾% over-all return fixed by the Commission complied fully with these standards. It provided an allowance of a weighted average of 3.21% representing the actual cost of Colorado's long-term debt,[13] an allowance of 6% for dividends on Colorado's preferred stock and a return of 8.95% on common stock, which, adjusted for financing charges of ½%, gave a net return to the equity owner of 8.45%. See *supra,* pp. 6-7. This net return corresponded more than favorably with the indicated investment requirements of persons seeking to purchase natural gas stock as shown by reference to common stocks of comparable natural gas companies on which information was available. *Supra,* p. 7. In addition—and most significantly—Colorado's own experience in an offering to the public of 56% of its common stock shortly before the close of the Commission's hearings demonstrates the liberality of the return allowed by the Commission; even though the earnings-offering price ratio to the public was only 7.03%, an amount substantially less than the 8.45% allowed by the

[13] Colorado implies that since its most recent note issue bore interest of 3.75%, the Commission should have fixed a higher interest cost (Pet. 20). But the 3.75% issue was included in reaching the weighted average of 3.21% (R. 99, 607), and, as stated by the court below, the 3.21% was enough to service the present outstanding long-term debt (R. 607). Moreover there was nothing in the record to indicate that Colorado had plans to seek additional long-term money in the near foreseeable future (R. 607.)

Commission, the public held Colorado's stock in such high regard that the offering was oversold at this lower earnings ratio. *Supra,* pp. 7-8. This actual experience, which is more convincing than any tabulation of estimates or prognostications (cf. *Lindheimer* v. *Illinois Tel. Co.,* 292 U.S. 151, 160-164), clearly reveals that the 8.45% return on common stock equity allowed by the Commission is more than adequate to maintain Colorado's credit and attract capital, and hence fully protected the investor's interest as well as Colorado's financial integrity.[14]

(b) While it is true that the decision here conflicts at least in principle with that of the Court of Appeals for the Eighth Circuit in *State Corporation Commission of Kansas, Northern Natural Gas Co.* v. *Federal Power Commission,* 206 F. 2d 690, certiorari denied, 346 U.S. 922, rehearing denied June 7, 1954, there is far more reason for this Court not to review this case than there was in *Northern Natural.* Apart from the fact that the conflict in principle between these cases was pointed out in the Commission's petition for certiorari in *Northern Natural* (see Petition in No. 469, October Term 1953, pp. 17-19), the instant decision is supported by the principal cases in this field (see *supra,* p. 16), whereas *Northern Natural* involved a misapplication of these decisions and

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[14] If, as petitioner contends, the Commission were adhering to a strict "bare bones" cost-of-money formula (Pet. 19), the Commission might very well have limited the return on the common stock equity to 7.03%.

conflicted not only with the instant case, but with *Mississippi River Fuel Corp.* v. *Federal Power Commission,* 163 F. 2d 433, 437 (C.A.D.C.) as well. See Petition in No. 469, October Term, 1953, pp. 5-18.

CONCLUSION

The decision below is clearly correct on the questions raised by Colorado. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1954.

APPENDIX

1. The Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001 *et seq.*) provides in pertinent part:

Sec. 2. As used in this Act—

* * * * *

(c) *Rule and Rule Making.*—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

* * * * *

Sec. 5. ADJUDICATION

* * * * *

(c) *Separation of Functions.*—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of

ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

* * * * *

Sec. 8. DECISIONS—In cases in which a hearing is required to be conducted in conformity with section 7—

(a) *Action by Subordinates.*—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case

or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

2. The Natural Gas Act (52 Stat. 821, 15 U. S. C. 717 *et seq.*) provides in pertinent part:

Sec. 4.

* * * * *

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or

formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, speci-

fying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with

the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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